

# SENATE BILL REPORT

## SB 6316

As of March 19, 2018

**Title:** An act relating to the certification and evidence of adequate and available water.

**Brief Description:** Concerning the certification and evidence of adequate and available water.

**Sponsors:** Senators McCoy, Chase, Hunt, Ranker and Saldaña.

**Brief History:**

**Committee Activity:** Agriculture, Water, Natural Resources & Parks: 1/15/18.

### Brief Summary of Bill

- Provides that no building permit may be issued that will operate to impair senior water rights and would not otherwise harm fish or other aquatic life or their habitat unless mitigated.
- Allows a building permit applicant using a permit-exempt groundwater withdrawal to receive a building permit if mitigation requirements are met and the quantity of domestic water use is limited to up to 350 gallons per day.
- Requires that withdrawals from all permit exempt wells be metered and reported to the county and the Department of Ecology (Ecology).
- Requires that, under the Growth Management Act (GMA), a county or city must require physical and legal water availability be determined and be consistent with best available science and applicable laws and rules.
- Establishes that a mitigation certificate to withdraw water may only be issued if the water withdrawal would not cause an impairment to senior water rights and would not harm fish or other aquatic life or their habitat unless mitigated.

### SENATE COMMITTEE ON AGRICULTURE, WATER, NATURAL RESOURCES & PARKS

**Staff:** Karen Epps (786-7424)

*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:** Building Permits. Under the State Building Code, an applicant for a building permit for a building that requires potable water must provide evidence of an adequate water supply for the intended use of the building. The evidence may be in the form of a water right permit from Ecology, a letter from an approved water purveyor stating the purveyor's ability to provide water, or another form verifying the existence of an adequate water supply. The process by which land divisions, including subdivisions, dedications, and short subdivisions may occur is governed by state and local requirements.

GMA. The GMA is the comprehensive land use planning framework for counties and cities in Washington. Originally enacted in 1990 and 1991, GMA establishes land use designation and environmental protection requirements for all Washington counties and cities, and additional planning duties for the 28 counties and the cities within them that fully plan under GMA. The GMA directs counties and cities that fully plan under GMA to adopt internally consistent comprehensive plans that are generalized, coordinated land use policy statements of the governing body. Comprehensive plans must address specified planning elements, including a land use element and a rural element, each of which is a subset of a comprehensive plan.

Water Rights. Washington operates under a water right permit system. With certain exceptions, new rights to use surface or ground water must be established according to the permit system. Exemptions include any withdrawal of public groundwater for stock watering purposes, for watering a lawn, or for a noncommercial garden less than one-half acre. Single or group domestic uses or industrial purposes not exceeding 5000 gallons a day are also exempt.

Ecology must consider a four-part test when deciding whether to issue a new water right, specifically whether: (1) water is available, (2) a beneficial use of water would be made, (3) granting the right would impair existing rights, and (4) the proposed use would detrimentally affect the public welfare. If an application passes this test, Ecology issues a permit which establishes a time table for constructing the infrastructure to access the water and for putting water to beneficial use. When the conditions of the permit are satisfied, Ecology issues a water right certificate.

Instream Flow Rules. Ecology has the authority to adopt rules establishing a minimum water flow for streams, lakes, or other public water bodies for the purposes of protecting fish, game, birds, and the recreational and aesthetic values of the waterways. These minimum water flow levels, commonly called instream flows, function as water rights with a priority date set at the adoption date of the corresponding rule. The instream flow cannot affect an existing water right with a senior priority date.

Watershed Planning. The Watershed Planning Act establishes a process through which local groups can develop and implement plans for managing and protecting local water resources and rights. The local groups authorized to develop watershed plans are organized by water resource inventory areas (WRIAs).

**Summary of Bill:** Building Permits. No building permit may be issued that will operate to impair senior water rights, including senior instream flow rights established by rule and not otherwise harm fish or other aquatic life or their habitat unless otherwise mitigated. Subject

to and in addition to these conditions, evidence of an adequate water supply may be in the form of:

- a water right permit or certificate from Ecology—an application for a water right is not sufficient proof of an adequate water supply; or
- a letter from an approved water purveyor stating the ability to provide water.

If either of these two forms of proof are not provided, then evidence of an adequate water supply for the intended use of the building must be in the form of the following:

1. A water well report from a groundwater withdrawal exempt from permitting; and
  - a. Proof that a meter has been or will be installed, with the metered use to be recorded by the county; and
  - b. Proof that water is legally and physically available in the form of a mitigation certification stating that both Ecology and the county have determined that water is legally available and physically available and where the water use is fully mitigated under this act; or
2. Another form sufficient to verify the physical and legal existence of an adequate water supply, such as from an alternative water supply.

Permit-Exempt Groundwater Withdrawals. A building permit application using a permit-exempt groundwater withdrawal may be approved provided that mitigation requirements are met and the quantity of water use is limited to water for domestic use up to 350 gallons per day. Withdrawals from all permit exempt wells must be metered, measured, and reported to the county and Ecology and that information is a matter of public record.

In WRIs where instream flow rules have not been adopted, proof of an adequate water supply must be by certification and meet mitigation requirements. In WRIs where rules have been adopted after 2000 or where a federal or state administered adjudication exists or has occurred and if those rules, consent decrees, or court orders specify mitigation requirements, the proof of an adequate water supply must meet the mitigation requirements specified in the applicable rule, consent decree, or court order. If mitigation requirements have been met under the applicable rule, consent decree, or court order, additional withdrawals of water that exceed those requirements must follow the mitigation requirements. In WRIs where instream flow rules have been adopted before 2000, mitigation requirements must be met.

GMA. A county or city shall impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant if the new uses are within 500 feet of an existing public water supply delivery system. A county or city may require additional information from an applicant needed to determine that adequate potable water is available. Appropriate provisions for water supply for a subdivision, dedication, or short subdivision under the GMA must be consistent with applicable laws and rules adopted pursuant to the water code, the minimum water flows and levels chapter, the groundwater act, and the water resource act.

In providing for the protection of the quantity of groundwater used for public water supplies, a county or city must ensure stream flow monitoring, measuring, and reporting in all subbasins where mitigation or new permit exempt wells are proposed. Local governments may, at their discretion, work with Ecology to fulfill these requirements. Additionally, in

providing for the protection of the quantity of groundwater used for public water supplies, a county or city must require physical and legal water availability be determined and be consistent with best available science and applicable laws and rules adopted pursuant to the water code, the minimum water flows and levels chapter, the groundwater act, and the water resource act, provided that the portions of rules that were adopted before 2000 that purport to exempt certain consumptive uses shall not be relied upon by counties or cities, and scientifically supportable water resource data, including water quantity, water quality, and instream flow assessments, to evaluate water resource impacts from projected growth. This information must include groundwater modeling representing recent conditions.

The rural element of a comprehensive plan must include measures to protect critical areas and surface and groundwater in a manner that must be consistent with applicable laws and applicable rules adopted pursuant to the water code, the minimum water flows and levels chapter, the groundwater act, and the water resource act, although the portions of rules that were adopted before 2000 that purport to exempt certain consumptive uses shall not be relied upon by counties or cities, and scientifically supportable water resource data, including water quantity, water quality, and instream flow assessments, using best available science to evaluate water resource impacts from projected growth.

Mitigation. Unless mitigation requirements are otherwise specified in an applicable rule adopted after 2000, any new domestic or industrial permit-exempt groundwater withdrawal is entitled to receive a mitigation certificate to withdraw water only if the water withdrawal would not cause, individually or cumulatively, an impairment to senior water rights, including senior instream flow rights, established by rule and would not otherwise harm fish or other aquatic life or their habitat unless mitigated. A mitigation certificate may only be issued once mitigation has been implemented as agreed upon by government entities. Appeals of Ecology's issuance of all mitigation certifications and review by the Pollution Control Hearings Board of the issuance of mitigation certifications are subject to de novo review by a superior court.

Mitigation certificates may be provided to applicants by Ecology for projects developed through the collaboration and mutual agreement of the following government entities (Government Entities):

- the county;
- Ecology;
- the Department of Fish and Wildlife; and
- any federally recognized tribe or tribes whose reservation, usual and accustomed fishing areas, or areas that support tribal treaty fisheries may be impaired by the withdrawal.

Mitigation projects must be completed before withdrawal or after withdrawal by the mutual agreement of the Government Entities. Mitigation certificates may only be issued once Ecology has certified that the applicant has achieved one hundred percent mitigation for the total annual increased consumptive uses of proposed withdrawals.

Additional Provisions. The watershed restoration account is created. Expenditures from the account may be used only for the costs of administering this act, including implementing mitigation projects as developed by Government Entities, and collecting data and completing

studies necessary to develop, implement, and evaluate mitigation projects. This act does not apply in the Yakima Basin, WRIAs 37, 38, and 39; those portions of WRIAs 3 and 4 located in the Skagit River Basin; or the Methow Basin, WRIA 48. Nothing in the water resources act affects the ability of any person to pursue a cause of action for the protection of any water right.

**Appropriation:** None.

**Fiscal Note:** Requested on January 12, 2018.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: There have been a number of bills trying to address the *Hirst* decision. This bill is designed to bring out the points that are of interest to the tribes. Legislation should be protective of senior water right holders, not impair instream flows, and be a basin-by-basin approach. Mitigation must be in-kind, in-time, and in-place. It must also protect fish, be based on good science, and be agreed to by the most senior water right holders, the tribes. Mitigation must protect tribal water rights. There needs to be water available for growth. This bill includes tribes as co-managers. This bill also needs to include more data collection to know how much water is available to make good management decisions. There needs to be planning for the next seven generations and beyond. It is important to have responsible stewardship of water resources and bring parties together on a basin-wide level. Mitigation needs to be considered to allow for growth in the state and in Indian country. It is important to track how much water is being used, so metering is important. Protecting water needs to be a priority for everyone. There needs to be a balance to protect treaty rights and work with the state to manage the resource. This bill establishes a responsible decision-making process. Tribes are fighting to protect salmon and fear losing their way of life. There needs to be good planning and good communication. This bill requires mitigation for building permits that would impact senior water holders and senior instream flows for fish and other aquatic life. This bill emphasizes reliance on best available science, including analysis techniques. This bill includes the relevant federally recognized tribe or tribes with other government entities in the approval process for mitigation certificates. There is a clear path forward in this bill that includes metering wells and monitoring stream flows. This bill provides accountability around the use of water and provides that the water being used must be fully mitigated. The data collection in this bill is an essential element of water management.

CON: This bill represents a step back from last week's bipartisan bill. The bill's 350-gallon limitation for indoor domestic use provides no protection from wildfires. This bill does not consider water recharge that occurs through septic recharge. There are concerns about whether this bill treats all watersheds with instream flow rules to be treated the same. The 2000-3000 exempt wells that would go in during a year would use a very small amount of consumptive water. Mitigation on a house-by-house basis does not make sense for the homeowner or for the resource. This bill presumes each well will have a marked impact. The bill asks cities and counties to do stream gaging, which will be expensive and they do not have the resources. This bill is a delegation of power from Ecology to local

governments. There are concerns about the delegation of power in this bill and the mitigation certificate approval process. The bill sets up a committee approval process for mitigation certificates, leaving the approval to non-elected committee members. This bill establishes a well-by-well approach to manage water that will be costly for land owners and local governments. This type of management does not achieve as much instream flow restoration as can be done with a comprehensive approach. This bill turns water into a commodity. This bill would shift responsibilities to local governments, including performing impairment analysis and stream gaging. Having each county manage water resources would lead to different decisions in different locations. This bill does not include provisions related to water right permit mitigation options. The unintended consequence of this bill would be to stop any growth and development.

**Persons Testifying:** PRO: Senator John McCoy, Prime Sponsor; Kat Brigham, Confederated Tribes of the Umatilla Indian Reservation; JoDe Goudy, Yakama Nation; Ben Joseph, Sauk-Suiattle Tribe; Leonard Foresman, Suquamish Tribe; Ron Allan, Jamestown S'Klallam Tribe; Shawn Yanity, Chairman, Stillaguamish Tribe of Indians; Phyllis Farrell, League of Women Voters of Washington State; Jay Julius, Lummi Nation Chairman; Bryce Yadon, Futurewise; Bruce Wishart, CELP, Sierra Club; Willie Frank, Nisqually Tribe.

CON: Cindy Alia, citizen; Bill Clarke, Washington Realtors; Laura Berg, Washington State Association of Counties; Glen Smith, Washington State Ground Water Association; Daryl Williams, Tulalip Tribes; Jan Himebaugh, Building Industry Association of Washington; Kathleen Collins, Washington Water Policy Alliance; Evan Sheffels, Washington Farm Bureau and Washington Cattlemens Association; Carl Schroeder, Association of Washington Cities.

**Persons Signed In To Testify But Not Testifying:** OTHER: Dave Christensen, Washington State Department of Ecology.